88-473

Supreme Court, U.S.
FILED
SEP 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the

Supreme Court

of the

United States of America

October Term, 1988

CHRIS KARSTETER,

Petitioner,

vs.

THE GRAHAM COMPANIES f/k/a
THE SENGRA CORPORATION, a Florida corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT, REVIEW DENIED BY THE SUPREME COURT OF FLORIDA

STEVEN A. EDELSTEIN, ESQ.
RESS, GOMEZ, ROSENBERG,
HOWLAND & MINTZ, P.A.
1700 Sans Souci Boulevard
North Miami, Florida 33181

Attorney for Petitioner
CHRIS KARSTETER

QUESTION PRESENTED FOR REVIEW

Whether the District Court of Appeal of Florida, Third District, erred in determining that §83.60(2) *Florida Statutes* was not unconstitutional, as a denial of due process of law.

A. Did the challenged statute deny Petitioner, KARSTETER, the right of due process of law in an eviction proceeding, by requiring the trial court to strike his defenses and determine liability against him through the entry of a default, based solely upon his failure to deposit accrued rent into the court registry.

B. Did the challenged statute deny Petitioner, KARSTETER, the right of due process of law, by depriving him of the right to jury trial, when such right was guaranteed by the *Florida Constitution*, the laws of Florida and by Rules of Court that were established by the Supreme Court of Florida.

C. Was the doctrine of mootness inapplicable to the present proceeding, because the application of the challenged statute is "capable of repetition, yet evading review".

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner: Chris Karsteter; and the Respondent: The Graham Companies f/k/a The Sengra Corporation, a Florida Corporation. Also having an interest in this proceeding are: Miami Lakes Inn, Athletic Club and Golf Resort, Inc., f/k/a Miami Lakes Inn and Country Club, a Florida corporation, which is a wholly owned subsidiary of The Graham Companies, and various officers and directors of both Respondent and its subsidiary corporation, including: William A. Graham, Robert L. Rawls, William E. Graham, Wallace L. Lewis, Carol Graham Willie, Edwin E. Feathers, C. David Younts, Sandra Graham Younts, Jerry Broz, and Beth Graham Martinez.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO OFFICIAL REPORTS	1
STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE COURT IS INVOKED	1
STATUTE WHICH THE CASE INVOLVES	1
STATEMENT OF THE CASE	2
ARGUMENT	12
THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN DETERMINING THAT §83.60(2) FLA.STAT. WAS NOT UNCONSTITUTIONAL, AS A DENIAL OF DUE PROCESS OF LAW.	
A. Due Process of Law	12
B. Due Process protects the Right to Trial by Jury in Florida	16
C. Issue of Mootness	23
CONCLUSION	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

CASES	PAGES
American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 731 (1932)	12
Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed2d 62 (1965)	13
Barry v. Robson, 65 So.2d 739 (Fla. 1953)	25
Boston Rug Galleries, Inc. v. William Iselin & Co., Inc., 212 So.2d 60 (Fla. 4th DCA 1968)	19
Carter v. Suggs, 190 So.2d 787 (Fla. 1st DCA 1966)	19
City of Cocoa v. Sullivan Packing Co., 167 So.2d 750 (Fla. 2d DCA 1964)	19
Democratic Party of the U.S. v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981)	24
Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)	23, 24
Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915)	13
Hightower v. Bigoney, 156 So.2d 506 (Fla. 1963)	19
Hobbs v. Fla. First National Bank of Jacksonville, 480 So.2d 153 (Fla. 1st DCA 1985)	19

TABLE OF AUTHORITIES—(Continued)

CASES	PAGES
Kanter v. Safran, 68 So.2d 553 (Fla. 1953)	26
Karsteter v. The Graham Companies, 521 So.2d 298 (Fla. 3d DCA 1988), *Rev. denied*, ___So.2d___ (Fla. 1988)	1, 11
Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972)	12, 13, 14
Lucky Ned Pepper's, Ltd. v. Columbia Park and Recreation Assn., 64 Md.App.2d 222, 494 A.2d 947 (Md.App. 1985)	19, 20, 21, 22
Miller v. Rolfe, 97 So.2d 132 (Fla. 1st DCA 1957)	19
Molfetas v. State, 323 So.2d 599 (Fla. 3d DCA 1975)	19
Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969)	23
Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)	25
Railroad Comm. v. Pacific Gas Co., 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319 (1938)	13
Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)	24

TABLE OF AUTHORITIES—(Continued)

CASES	PAGES
Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973)	24
Routal Corp., N.V., Inc. v. Ottati, 391 So.2d 308 (Fla. 4th DCA 1980)	26
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911)	23
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974)	24, 25
Wartman v. Branch 7, Civil Division County Court, Milwaukee County, Wisconsin, 510 F.2d 130 (7th Cir. 1975)	17
Woods v. Holy Hospital, 591 F.2d 1164 (5th Cir. 1979)	17
CONSTITUTION AND STATUTES	
FEDERAL	
Art. III, *U.S.Const.*	1
Due Process Clause, Amend. XIV, *U.S.Const.*	9, 10, 17
Equal Protection Clause, Amend. XIV, *U.S.Const.*	9, 10
28 U.S.C. §1254	1

TABLE OF AUTHORITIES—(Continued)

CONSTITUTION AND STATUTES	PAGES
FLORIDA	
Art. I, §9, *Fla.Const.*	9, 17
Art. I, §21, *Fla.Const.*	9, 17
§59.46 *Fla.Stat.*	11, 28
§69.071 *Fla.Stat.*	17
§83.44 *Fla.Stat.*	8
§83.48 *Fla.Stat.*	9, 11, 28
§83.57 *Fla.Stat.*	7
§83.60(2) *Fla.Stat.*	1, 8, 9, 10, 11, 12, 14, 16, 17, 22, 27, 28
§83.60(2) *Fla.Stat.* [Amended, eff. October 1, 1987]	2
§83.62 *Fla.Stat.*	26
§83.64 *Fla.Stat.*	7, 8
OTHER AUTHORITIES	
Sup.Ct.R. 17.1 (b), (c)	1
Fla.R.Civ.P. 1.430	18
Fla.R.Summ.P. 7.150	19

REFERENCE TO OFFICIAL REPORTS

This Petition for Writ of Certiorari is directed to the following decision: *Karsteter v. The Graham Companies*, 521 So.2d 298 (Fla. 3d DCA 1988), *Petition for Review denied*, ____So.2d____ (Fla. 1988) (App. Q-1-2).

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE COURT IS INVOKED

This Petition seeks review of an opinion of the District Court of Appeal of Florida, which was entered on March 8, 1988. A timely Notice to Invoke Discretionary Jurisdiction was filed in the Supreme Court of Florida on March 28, 1988, which was followed by a Petition for Review of the District Court's Opinion. The Petition for Review was denied by the Supreme Court of Florida on June 22, 1988.

Jurisdiction is vested in the Supreme Court of the United States pursuant to Art. III, *U.S.Const.*, 28 *U.S.C.* §1254 and *Sup.Ct.R.* 17.1(b), (c).

STATUTE WHICH THE CASE INVOLVES

This Petition involves a constitutional challenge to §83.60(2) *Fla.Stat.*, as a denial of due process of law. As applied to the present case, §83.60(2) *Fla.Stat.* provided that:

> In an action by the landlord for possession of a dwelling unit based upon non-payment of rent, if a tenant interposes any defense other than payment, the defendant shall pay into the Registry of the Court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due. Failure of the tenant to pay rent into the Registry of the Court as provided herein constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default.

The eviction proceeding from which the present Petition derives was commenced on June 6, 1986. Effective October 1, 1987, the State of Florida tightened the stranglehold that landlords have on tenants in eviction proceedings by amending §83.60(2) *Fla.Stat.*, so that at present, the law in Florida is that:

> In any action by the landlord for possession of a dwelling unit based upon non-payment of rent, if a tenant interposes any defense other than payment, the defendant shall pay into the Registry of the Court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due. Failure of the tenant to pay rent into the Registry of the Court as provided herein constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default *without further notice or hearing thereon.*

STATEMENT OF THE CASE

A. Factual background of the Case.

This was an eviction proceeding filed in the County Court in and for Dade County Florida. Petitioner, CHRIS KARSTETER [hereinafter "KARSTETER"], was a defendant. Respondent, THE GRAHAM COMPANIES f/k/a THE SENGRA CORPORATION, a Florida corporation [hereinafter "GRAHAM"], was the plaintiff. A second defendant was MIAMI LAKES INN, ATHLETIC CLUB AND GOLF RESORT, INC., f/k/a MIAMI LAKES INN AND COUNTRY CLUB, a Florida corporation [hereinafter "MIAMI LAKES INN"] (App. A-1-9), which was a wholly owned subsidiary of GRAHAM (App. O-5). Throughout this Petition, references to the Appendix will refer to "App." with appropriate pagination.

The facts of the case, which were determined through discovery, established that in August, 1984, KARSTETER,

a resident of Seattle, Washington, was hired by MIAMI LAKES INN, pursuant to a letter agreement dated August 20, 1984, which was signed by C. David Younts, President of MIAMI LAKES INN (App. B-16-17). The employment was to extend "year-to-year on a per annum basis" (App. N-9). The agreement listed various "terms of employment", including, *inter alia*, the following:

> 3. Housing—Miami Lakes Inn & Country Club will provide. Gas, electric, water, and telephone are not included (App. B-16).

In accordance with this provision, a rent free condominium apartment was provided to KARSTETER from the date he was hired. The particular apartment which was owned by GRAHAM (App. O-5), was described as:

> Miami Lakes Eagle Nest Duplexes
> 15461 Durnford Drive
> Miami Lakes, Florida 33014 (App. B-18).

MIAMI LAKES INN was a wholly owned subsidiary of GRAHAM (App. O-5). The respective officers and directors of the two companies are (App. O-9-11):

	GRAHAM	MIAMI LAKES INN
Board Chairman	William A. Graham	William A. Graham
President	Robert L. Rawls	C. David Younts
Executive V.P.	William E. Graham	Sandra Graham Younts
Senior V.P.	Wallace L. Lewis	Robert L. Rawls
Vice President	Carol Graham Willie	Jerry Broz
Sec.-Treas.	Edwin E. Feathers	Edwin E. Feathers

KARSTETER's salary was paid by GRAHAM. KARSTETER was also issued various credit cards including an American Express credit card on behalf of GRAHAM; an Av-Med health card on behalf of GRAHAM's predecessor, SENGRA; and an AT&T card on behalf of MIAMI LAKES INN (App. O-7). Based upon the presence of the same individuals as officers and directors of both corporations,

GRAHAM's issuance of credit cards to KARSTETER, and the fact that KARSTETER was paid his salary by GRAHAM rather than by MIAMI LAKES INN, KARSTETER sought to pierce the corporate veil existing between GRAHAM and MIAMI LAKES INN (App. B-2-3, 6, 10-11).

Without KARSTETER's knowledge, GRAHAM and MIAMI LAKES INN entered into a lease agreement for KARSTETER's apartment, on which the lessee was listed as "MIAMI LAKES INN & COUNTRY CLUB–KARSTETER". Two different copies of the lease existed and each was signed in a different manner. The lease which was attached as an exhibit to GRAHAM's Complaint had a term extending from October 1, 1985 to September 30, 1986, was dated December 26, 1985, had the number "901" penciled in next to the property description, and had the signature of Beth G[raham] Martinez, as well as C. David Younts' initials at the bottom (App. B-22-26). A second copy of the lease agreement also existed, however, which listed the same term from October 1, 1985 to September 30, 1986, but was dated December 26, 1986. This latter lease agreement had neither the "901" penciled in, nor the signature of Beth G. Martinez at the bottom (App. B-18-21). Neither lease was signed by KARSTETER (App. B-18-26), nor was he ever shown a copy of either lease by his employer, although his name is listed on both (App. N-7).

Since occupying the demised premises, in 1984, KARSTETER never paid any rent (App. N-7). On April 21, 1986, KARSTETER was orally notified by C. David Younts that he was being discharged (App. N-7-8). An eviction proceeding was subsequently filed in the Dade County Court on June 6, 1986 (App. A-1-9).

B. Procedural background of the case.

The issues presented herein derive from an eviction proceeding filed by GRAHAM against KARSTETER and MIAMI LAKES INN, in the Dade County Court (App. A-1-9).

In response to GRAHAM's Complaint for Removal of Tenant, MIAMI LAKES INN answered, admitting all of the allegations of the complaint (App. A-10-11), and stipulated to the entry of final judgment (App. A-12-13). KARSTETER filed an answer with affirmative defenses, a counterclaim, a crossclaim against MIAMI LAKES INN, and demanded a trial by jury (App. B-1-27).

During the course of the proceedings—on GRAHAM's Motion (App. C-1-3), and KARSTETER's Response (App. C-4-6)—KARSTETER's Counterclaim and Crossclaim were severed and transferred to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, General Jurisdiction Division (App. L-1-2), where they still remain pending as Case No. 86-35715 (CA 03). The reason for the severance and transfer was that the counterclaim and crossclaim both exceeded the jurisdiction of the Dade County Court, but the eviction proceeding was within the exclusive jurisdiction of such County Court.

The affirmative defenses raised by KARSTETER with regard to the eviction proceeding included the following:

AFFIRMATIVE DEFENSES

As and for Affirmative Defenses the Defendants, CHRIS KARSTETER AND ALL OTHERS IN POSSESSION, would state the following:

> 7. At all times material hereto the MIAMI LAKES INN ATHLETIC CLUB AND GOLF RESORT, INC. f/k/a MIAMI LAKES INN AND COUNTRY CLUB, a Florida corporation [hereinafter "MIAMI LAKES INN"] was and is a wholly owned subsidiary of Plaintiff, THE GRAHAM COMPANIES f/k/a THE SENGRA CORPORATION, a Florida corporation, [hereinafter "THE GRAHAM COMPANIES"], and the intermingling of officers, directors, managing agents and operations of the said Defendant, MIAMI LAKES INN and the said Plaintiff, THE GRAHAM

COMPANIES is such that the corporate veil which exists between same should be pierced for reason that they have operated in all respects as one and the same entity. As a consequence, the Complaint fails to state a cause of action against itself for removal of tenant.

8. At all times material hereto the Defendant, CHRIS KARSTETER [hereinafter "KARSTETER"] had in full force and effect a contract of employment with the Co-Defendant, MIAMI LAKES INN, which provided for employment on an annual basis, and which contract included the provision of rent free housing. As a consequence, there is no rent due from KARSTETER to either the Co-Defendant, MIAMI LAKES INN, or the Plaintiff, THE GRAHAM COMPANIES. The conditions of such contract for employment are set forth in an August 20, 1984 letter from C. David Younts to KARSTETER, a copy of which is attached hereto as Exhibit "1", and the period of employment is further set forth in the lease agreement of which there are two copies, which are attached hereto as Exhibits "2" and "3" respectively. It would further be shown that Exhibit "3" hereto is the same lease agreement which is attached as Exhibit "B" to the Plaintiff's Complaint.

9. At all times material hereto, Plaintiff, THE GRAHAM COMPANIES, ratified, accepted, approved, agreed to abide by, assumed, and/or accepted the assignment of the contract for employment of the Defendant, KARSTETER, as set forth in the August 20, 1984 letter, a copy of which is attached hereto as Exhibit "1" and the lease agreements, copies of which are attached hereto as Exhibits "2" and "3". As a consequence, Plaintiff, THE GRAHAM COMPANIES, has waived any and all rights to receipt of rental payments for reason that the Defendant, KARSTETER, is entitled, pursuant

to such contract of employment, to the provision of rent free housing by MIAMI LAKES INN, and by THE GRAHAM COMPANIES, jointly and severally.

10. Plaintiff, THE GRAHAM COMPANIES, failed to comply with the provisions of §83.57 *Fla.Stat.* which provides for the termination of tenancies [App. R-1-2]. To this extent it would be shown that the term of the tenancy on the property in question was established by the lease agreement as being one year extending from October 1, 1985 through September 30, 1986, and pursuant to the provisions of §83.57 *Fla.Stat.*, written notice of the termination of such lease was required to be provided to the Defendant, KARSTETER, not less than 60 days prior to the end of the term of his occupancy. Plaintiff, THE GRAHAM COMPANIES, has totally failed to comply with this requirement for reason that the only notice provided to the Defendant, KARSTETER, is a "Speed Letter" from John Halley dated May 7, 1986, which "Speed Letter" has indicated a termination of the lease agreement, together with an increase in the amount of rent from $730.00 a month as indicated in the lease agreements attached hereto as Exhibits "2" and "3", to $740.00 a month, as indicated in the "Speed Letter"; and an additional provision requiring a security of $1,100.00, which under the lease agreements attached hereto as Exhibits "2" and "3" is indicated as "NONE". A true copy of the "Speed Letter" dated 5/7/86 is attached hereto as Exhibit "4".

11. Plaintiff, THE GRAHAM COMPANIES, has brought the within cause of action as a "retaliatory measure" in violation of §83.64 *Fla.Stat.* [App. R-2], in that it has discriminated against the Defendant, KARSTETER, by treating the said Defendant differently as to the rent charged for the housing than is required under the letter agreement attached hereto

as Exhibit "1" and the lease agreements attached hereto as Exhibits "2" and "3".

12. Plaintiff, THE GRAHAM COMPANIES, has acted in "bad faith" in the filing of the within Complaint for Removal of Tenant for Non-Payment of Rent in direct violation of §83.44 *Fla.Stat.* [App. R-1], and in further violation of §83.64 *Fla.Stat.* [App. R-2].

13. The provisions of §83.60(2) *Fla.Stat.* are inapplicable to the within cause of action for reason that the agreement for the employment of the Defendant, KARSTETER, by the Co-Defendant, MIAMI LAKES INN, specifically provides that housing is without charge, and the period of such employment is specified by the lease agreements, copies of which are attached hereto as Exhibit "2" and "3".

14. The provisions of §83.60(2) Fla.Stat. cannot be imposed upon the Defendant, KARSTETER, for reason that it is unconstitutional as a denial of free access to the courts.

15. At all times material hereto the Co-Defendant, MIAMI LAKES INN, had in full force and effect an Employee Handbook that set forth Special Regulations which could result in termination of employment. The Co-Defendant, MIAMI LAKES INN, and the Plaintiff, THE GRAHAM COMPANIES, jointly and severally, and collusively, have sought to terminate the employment of the Defendant, KARSTETER, for reasons not included within the special regulations set forth in the Employee Handbook, a true copy of which is attached hereto as Exhibit "5".

16. Defendant, KARSTETER, has been forced to retain the Law Offices of Ress, Gomez, Rosenberg,

Howland & Mintz, P.A. to defend him in the wrongful eviction action which has been instituted by Plaintiff, THE GRAHAM COMPANIES, and has obligated himself to pay attorneys' fees with respect to same. As a consequence, Defendant, KARSTETER, is entitled to an award of attorneys' fees in accordance with the provisions of §83.48 *Fla.Stat.* (App. B-2-5; R-1).

Following the receipt of KARSTETER's pleadings, GRAHAM filed a Reply to Affirmative Defenses (App. D-1-4), a Reply to Counterclaim, Affirmative Defenses to Counterclaim, and Motion to Dismiss Counterclaim (App. E-1-6), a Notice of Demand of Payment of Rent Pendente Lite into Registry of Court (App. F-1-2), a Motion to Strike Answer of Affirmative Defenses of Defendant, Chris Karsteter, and for Entry of Default Pursuant to Florida Statutes §83.60(2) (App. G-1-3), and a Notice of Trial (App. G-4-5).

As a consequence of the demand for payment of Rent into the Court Registry, and the Motion to Strike and for Entry of Default, KARSTETER filed a Response, specifically attacking the constitutionality of §83.60(2) *Fla.Stat.*—which issue had already been raised as Affirmative Defense No. 14—as violative of rights guaranteed by Art. I, §§9 and 21, *Fla.Const.* and of rights guaranteed under the Due Process and Equal Protection Clauses, *U.S.Const.* (App. H-1-2). A Memorandum of Law was filed by KARSTETER in support of his constitutional attack on §83.60(2) *Fla.Stat.* (App. I-1-12), and GRAHAM filed a Reply Memorandum (App. J-1-4).

The constitutional issue was initially argued below on July 22, 1986 (App. K-1-41), at which time the court required that rental monies be deposited into the registry of the court. When advised that both KARSTETER and his wife were out of work, having been terminated by GRAHAM and MIAMI LAKES INN, and could not make such payments, the court applied the provisions of §83.60(2) *Fla.Stat.* to strike KARSTETER's pleadings to enter a default (App. K-11-12),

and an Order confirming such default was accordingly entered (App. L-1-2).

While the county court was considering the entry of a default, KARSTETER pointed out that there was also a demand for jury trial, which required a jury determination of the amount of rent that was allegedly owed by KARSTETER to GRAHAM. The court was advised that it was circumventing and depriving KARSTETER of such right to jury trial by making its own determination of the amount of rent that was required to be deposited into the court registry (App. K-22-23).

Subsequently at a hearing on August 4, 1986 (App. L-3-55), a Final Judgment was entered for possession of the demised premises (App. M-3-4). Thereafter, in compliance with such Final Judgment, KARSTETER vacated the premises (App. L-52).

An appeal of the Final Judgment was filed with the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Appellate Division. In his Brief, KARSTETER argued that §83.60(2) *Fla.Stat.* was unconstitutional in that it violated the Due Process and Equal Protection Clauses of the *U.S.Const.*, various provisions of the *Fla.Const.*, and deprived KARSTETER of his right to trial by jury. The Appellate Court, however, affirmed the Final Judgment "Per Curiam", by decision rendered July 21, 1987 (App. P-1).

Following the conclusion of the initial appeal proceeding, KARSTETER filed a Petition for Writ of Certiorari with the District Court of Appeal of Florida, Third District, wherein he again argued that §83.60(2) *Fla.Stat.* was unconstitutional in violation of the Due Process and Equal Protection Clauses of the *U.S.Const.* and that it deprived him of trial by jury. Following oral argument, in an opinion entered March 8, 1988, the court held as follows:

PER CURIAM.

Section 83.60(2), Florida Statutes (1985), which requires a tenant asserting a right to possession to deposit rent into the court registry pending resolution of the litigation, is not, unconstitutional. *See, Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); *K.D. Lewis Enters. Corp. v. Smith*, 445 So.2d 1032 (Fla. 5th DCA 1984). *See* §718.401(4), *Fla.Stat.* (1985); *Farrell v. Drew*, 19 N.Y.2d 486, 281 N.Y.S.2d 1, 227 N.E.2d 824 (1967).

Certiorari denied. *Karsteter v. The Graham Companies*, 521 So.2d 298 (Fla. 3d DCA 1988) (App. Q-1-2).

A timely petition for review of this opinion was filed with the Florida Supreme Court, which declined to accept jurisdiction by order entered June 22, 1988 (App. P-8-9).

Pursuant to §§83.48 and 59.46 *Fla.Stat.*, the prevailing party in an action to enforce the provisions of a rental agreement may recover attorneys fees at both the trial and appellate levels [App. R-1]. In the within proceeding, GRAHAM has been awarded the following: attorneys' fees of $2,500.00 and costs of $155.50 at the trial level (App. M-3-4); attorneys' fees of $4,250.00 on appeal to the Circuit Court, Appellate Division (App. P-2-4); attorneys fees of $3,875.00 on Petition for Certiorari by the Third District Court of Appeal (App. P-5-7); and $500.00 on Petition for Review by the Supreme Court of Florida (App. P-8-9). All in all, GRAHAM has received awards totalling $11,125.00 attorneys' fees and $155.50 costs, to which legal interest at a rate of 12% per annum will be applied.

This present Petition for Writ of Certiorari has been filed, seeking a determination that the District Court of Appeal of Florida, Third District erred in deciding that §83.60(2) *Fla.Stat.* is not unconstitutional. It also seeks a reversal of the various awards of attorneys' fees that have been entered

in favor of GRAHAM, and a determination that if fees were to be awarded, they should have been awarded in favor of KARSTETER and against GRAHAM.

ARGUMENT

The issue presented by this Petition involves a constitutional challenge to §83.60 *Fla.Stat.*, which issue was raised in the trial court and at each appellate level in the Florida Court System. When originally presented in the eviction proceeding, the challenge was disregarded by the Dade County Court, and the provisions of §83.60(2) *Fla.Stat.* were applied to strike KARSTETER's pleadings and to enter a default against him.

A. Due Process of Law.

Throughout this proceeding, KARSTETER has claimed that the application of §83.60(2) *Fla.Stat.* deprived him of the fundamental right of due process of law. Section 83.60(2) *Fla.Stat.* provides that if accrued rent is not deposited into the court registry, the tenant's defenses are stricken and a default is entered against him. Such action constitutes a complete and final determination of liability on the merits in favor of the landlord, and against the tenant. In effect the landlord automatically wins the eviction proceeding, without a trial and without having to prove any of his allegations, while the tenant automatically loses without ever being given any opportunity to defend or be heard.

Section 83.60(2) *Fla.Stat.* was applied in just such a fashion against KARSTETER, so that liability was determined against him and in favor of GRAHAM, without a trial and without an opportunity to be heard. This result was totally contrary to the decisions of this Court which have clearly held that due process under the *United States Constitution* requires that there be an opportunity for a party to present every available defense to litigation. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 77 L.Ed. 731 (1932); *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31

L.Ed.2d 36 (1972). "A fundamental requirement of due process is 'the opportunity to be heard.' " *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965). As stated by Justice Oliver Wendell Holmes, under different circumstances, but equally applicable here:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. *Frank v. Mangum*, 237 U.S. 309, 347, 35 S.Ct. 582, 595, 59 L.Ed. 969, 988 (1915).

Similarly, in *Railroad Comm. v. Pacific Gas Co.*, 302 U.S. 388, 393, 58 S.Ct. 334, 338, 82 L.Ed. 319, 322, (1938), it was held that:

> The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.

In his arguments to the Florida courts, KARSTETER persistently pointed to this Court's decision in *Lindsey v. Normet, supra*, which involved a review of Oregon's eviction statute. The Oregon statute provided for an expedited trial date in eviction proceedings, unless a tenant obtains a continuance of such expedited trial date, which is conditioned on the "tenant's posting security for the payment of any rent that may accrue, if the plaintiff ultimately prevails, during the period of the continuance." 405 U.S. at 63, 92 S.Ct. at 869, 31 L.Ed.2d at 44. While the court upheld the majority of the challenged Oregon statute, it also specifically recognized that *"Due process requires that there be an opportunity to present every available defense"*, 405 U.S. at 66, 92 S.Ct. at 870, 31 L.Ed.2d at 46.

In response to the argument presented, GRAHAM attempted to show that the *Lindsey v. Normet* decision supported the actions of the Dade County Court in striking the affirmative defenses of KARSTETER, and entering a

default against him. GRAHAM argued that §83.60(2) *Fla.Stat.* was reasonable and justified in view of the nature of the Landlord-Tenant relationship, which was recognized in *Lindsey v. Normet.*

Such argument, however, totally overlooked the fact that in *Lindsey v. Normet*, the Court was reviewing an Oregon statute which provided for an expedited trial date, whereas in the present case, the challenged Florida statutory provision totally deprives the tenant of any trial whatsoever. By the mere failure to deposit accrued rent into the court registry, the tenant's defenses are stricken and liability is determined against him by the entry of a default.

The facts of the present case present as clear a picture of statutory inequity and unconstitutionality as may be imagined. GRAHAM brought an eviction proceeding against its wholly owned subsidiary, MIAMI LAKES INN, and KARSTETER based upon a lease agreement that it had privately entered into with MIAMI LAKES INN. Although his name appeared on the lease agreement, KARSTETER was never shown a copy of it, and never executed it. KARSTETER only knew that he had an employment contract with MIAMI LAKES INN, which provided that he would receive rent-free housing. Indeed, from the time that KARSTETER was employed by MIAMI LAKES INN in October 1984, until the eviction proceeding was filed in June 1986, he had been provided with rent-free housing, and had never paid any rent whatsoever. Further to this, the contract that KARSTETER had with MIAMI LAKES INN was ratified by GRAHAM which paid KARSTETER's salary and provided KARSTETER with credit cards and insurance coverage, as well as housing.

When KARSTETER attempted to raise these issues as affirmative defenses, however, and to question the very existence of the lease agreement, GRAHAM invoked the provisions of §83.60(2) *Fla.Stat.* to require KARSTETER to deposit rent into the court registry. When he failed to do so,

his defenses were striken and a default was entered against him. With regard to this, a portion of the argument presented by KARSTETER to the trial court is significant:

> THE COURT: The lease provides—
>
> MR. EDELSTEIN: The statute—
>
> THE COURT: —for the payment of the rent which is $730 a month.
>
> MR. EDELSTEIN: Between one of the Defendants and Miami Lakes Inn, which is a wholly-owned subsidiary, but Mr. Karsteter's agreement says that he doesn't pay anything. . . (App. K-19).
>
> * * *
>
> THE COURT: The statute does provide that if the money is not placed into the registry of the Court, then the Court may enter default, and thereupon proceed with the case for default judgment, final judgment of possession. (App. K-22).
>
> * * *
>
> MR. EDELSTEIN: Well, Judge, here again, part of our defenses raised which is that the amount involved that you are requiring to be deposited into the Court registry is an inaccurate amount; that the actual amount—and I think it requires a jury determination—is zero dollars, and now if the Court is going to apply the statute and strike that affirmative defense, then we are going to be precluded and deprived of an opportunity to be heard by the Court.
>
> THE COURT: That is what the statute provides.

MR. EDELSTEIN: I understand that, and that is why we are saying the statute is unconstitutional because it is going to take away our challenge even to the amount due, and if it turns out that if this matter was tried by a jury, and a jury came back and determined that the amount of monthly rent which we owed was zero, which is a genuine issue of material fact, then the statute is denying us access to the Courts and an opportunity to be heard.

THE COURT: $1,460 in the registry, in the court registry, and a jury trial will be granted (App. K-22-23).

The same issues were raised by KARSTETER at each level of the Florida appellate court system, and at each level such argument were disregarded. Indeed, when the argument was presented to Florida's Third District Court of Appeal, on Petition for Certiorari, the Court specifically held that §83.60(2) *Fla.Stat.* was constitutional; and the Supreme Court of Florida thereafter declined to review that determination. Nevertheless, the application of §83.60 *Fla.Stat.* in the present case clearly constituted an obvious deprivation of KARSTETER's fundamental right of due process of law. As a consequence, the within Petition for Writ of Certiorari has been filed to: (1) review the opinion of the Florida Third District Court of Appeal; (2) declare §83.60(2) *Fla.Stat.* unconstitutional as a denial of due process of law; and (3) reverse the decisions of the various Florida courts which were entered against KARSTETER.

B. Due Process protects the Right to Trial by Jury in Florida.

It should also be recognized that KARSTETER included a demand for jury trial as part of his Answer and Affirmative Defenses that were filed in the Dade County Court. His right to trial by jury, however, was denied when the trial court

struck his defenses and entered a default against him pursuant to §83.60(2) *Fla.Stat.*

It is recognized that the right to trial by jury in civil cases that was created by the seventh amendment to the U.S. Constitution, is not applicable to the states. *Woods v. Holy Hospital*, 591 F.2d 1164 (5th Cir. 1979): *Wartman v. Branch 7, Civil Division County Court, Milwaukee County, Wisconsin*, 510 F.2d 130 (7th Cir. 1975). Nevertheless, when the State of Florida established in its constitution, laws and court rules for the right of trial by jury in civil actions, any deprivation of such right would be a denial of due process under Amendment XIV to the *U.S. Constitution.*

Art. I, §9 and §22, *Fla.Const.*, provide as follows:

> SECTION 9. **Due process.**—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself
>
> * * *
>
> SECTION 22. **Trial by Jury.**—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Section 69.071 *Fla.Stat.* specifies the number of jurors that are required in civil actions:

> **69.071 Number of jurors.**—In all civil actions when a jury is impaneled, a jury of six qualified jurors is sufficient.

The *Florida Rules of Civil Procedure*, as adopted by the Supreme Court of Florida, 187 So.2d 598, 624-625 (Fla. 1966), *Amended*, 265 So.2d 21, 40 (Fla. 1972), clearly sets forth the right to jury trial in civil actions:

RULE 1.430 DEMAND FOR JURY TRIAL; WAIVER

(a) Right Preserved. The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than ten days after the service of the last pleading directed to such issue. The demand may be indorsed upon a pleading of the party.

(c) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise, he is deemed to demand trial by jury for all issues so triable. If he has demanded trial by jury for only some of the issues, any other party may serve a demand for trial by jury of any other or all of the issues triable by jury ten days after service of the demand or such lesser time as the court may order.

(d) Waiver. A party who fails to serve a demand as required by this rule waives trial by jury. If waived, a jury trial may not be granted without the consent of parties but the court may allow an amendment in the proceedings to demand a trial by jury or order a trial by jury on its own motion. A demand for trial by jury may not be withdrawn without the consent of the parties.

Additionally, the *Florida Small Claims Rules*, as adopted by the Supreme Court of Florida, 270 So.2d 720, 734 (Fla. 1973), *Amended*, 366 So.2d 398, 399 (Fla. 1978), *Amended*, 461 So.2d 1344, 1347 (Fla. 1984), which apply to actions for eviction brought in the Florida County Courts, provides that:

7.150 JURY TRIALS

> Jury trials may be had upon written demand of the plaintiff at the time of the commencement of the suit, or by the defendant within five days after service of notice of suit or at pretrial conference, if any, or otherwise jury trial shall be deemed waived.

Florida law has long recognized that the fundamental right to trial by jury is inviolate. In *Miller v. Rolfe*, 97 So.2d 132 (Fla. 1st DCA 1957) it was stated that:

> Throughout the annals of our jurisprudence the right to trial by jury in actions cognizable at law, as guaranteed by the clear mandate of our Constitution, has remained sacred and inviolate, and although it may be waived by consent of the parties, it can neither be disregarded nor withheld by the court over the objection of a party vested with such right. On the issue of damages, appellants were entitled as of right to a jury trial in a court of law, and in the absence of a waiver thereof, they could not be deprived of that right. 97 So.2d at 135.

This statement has often been quoted and cited by Florida Appellate Courts. *See Hightower v. Bigoney*, 156 So.2d 506 (Fla. 1963); *City of Cocoa v. Sullivan Packing Co.*, 167 So.2d 750 (Fla. 2d DCA 1964); *Carter v. Suggs*, 190 So.2d 787 (Fla. 1st DCA 1966); *Boston Rug Galleries, Inc. v. William Iselin & Co., Inc.*, 212 So.2d 60 (Fla. 4th DCA 1968); *Molfetas v. State*, 323 So.2d 599 (Fla. 3d DCA 1975); *Hobbs v. Fla. First National Bank of Jacksonville*, 480 So.2d 153 (Fla. 1st DCA 1985).

A jury trial issue similar to KARSTETER's was addressed by the Court of Special Appeals of Maryland in *Lucky Ned Pepper's Ltd. v. Columbia Park and Recreation Assn.*, 64 Md.App. 222, 494 A.2d 947 (Md.App. 1985), which construed a Maryland statute that required a tenant to pay all past due accured rents into an escrow account when such tenant

is involved in a summary eviction proceeding and prays for a jury trial. In holding such statute unconstitutional, the court first noted that:

> Trial by jury has been described as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Thomas Jefferson, *Letter to Thomas Paine* (1789). 494 A.2d at 948

The court then went on to explore the extent to which a right to trial by jury could be curtailed in an eviction proceeding:

> We agree with appellant that this statute, to the extent that it provides for an escrow of past due rents, amounts to more than merely a reasonable regulation of one's right to a jury trial. We believe that it interferes with this right to the extent that the right becomes meaningless. We explain.
>
> Requiring the tenant to escrow "all accrued and unpaid rents and all rents due" presupposes a determination that the money is owed. "The word *due* always imports a fixed and settled obligation or liability. . . ." Black's Law Dictionary 5th ed. 1979) p. 448 (emphasis added). Section 8-118 permits the district court, ex parte and without constraints, to order an escrow of accrued and unpaid rent. This necessarily requires the court to determine what money is owed to the landlord as of the time the jury trial is prayed. That unfettered and unconditional determination requires a factual finding which impermissibly encroaches upon the function of the jury.
>
> Moreover, the practical effect of a district court order, under §8-118, is to require that a party prepay any possible judgment in order to obtain a jury trial. This places a premium on the exercise of this right in the

context of landlord-tenant action. While no other jurisdiction has so encumbered a civil litigant's right to a jury trial, we believe that requiring such a premium for the exercise of one's right to a jury trial is unreasonable. We realize that the legitimate purpose of summary eviction proceedings, i.e., accelerated relief, is often frustrated by a prayer for jury trial. We believe, however, that requiring an escrow of past due rents provides a secure fund for the landlord, something to which neither he nor any other litigant is otherwise entitled and something which far exceeds previously defined "reasonable regulation" of the right to a jury trial.

* * *

In any event, the question is as to the reasonableness of the regulation. As to the issue immediately before us (accrued and unpaid rents), the price is exorbitant. It is, indeed, a different situation where, as here, the price to be paid makes the right practically unavailable. Under §8-118, a tenant, wishing a jury trial, can be ordered to repay what amounts to all monies allegedly owed; this is not the same as requiring that same party to pay the additional costs attendant on a jury trial. The payment, in the former instance, becomes a premium on the exercise of one's inviolate right to a civil jury.

Consequently, because the statute requires a predetermination of the amount owed and because it places a premium on the exercise of one's right to a civil jury, we believe that §8-118, to the extent that it provides for the payment of past due (accrued) rents into escrow, is an unreasonable, and, therefore, unconstitutional interference with that right. 494 A.2d at 951-953.

One of the primary reasons the *Lucky Ned Pepper* court held that the statute under review was unconstitutional concerned the manner in which the amount of past due rent required to be deposited, if any, was calculated. As noted by the court, the statute in effect required that the trial court determine what money was owed to the landlord as of the time that the jury trial was requested. Such an unfettered and unconditional determination, however, required a factual finding which impermissibly encroached upon the function of the jury. This is the identical argument that was presented by KARSTETER to the Dade County Court (See pp. 15-16 of this Petition, *supra*), and which was also raised in each appellate level of the Florida Court System. Such argument, however, was totally rejected, and KARSTETER was required to deposit the amount of rent that was alleged in GRAHAM's complaint into the court registry.

KARSTETER has consistently argued that he was entitled to have a jury determine, *inter alia*, whether the $1,460.00 that the court ordered posted, was in fact owed, or whether he was entitled to continue to receive rent-free housing for the remaining length of his employment agreement with MIAMI LAKES INN and GRAHAM. The provisions of §83.60(2) *Fla.Stat.* deprived KARSTETER of this right, and required that he deposit the rent which GRAHAM alleged was owed, or alternatively the amount which the court determined should be deposited which in this instance was one and the same thing. As a consequence, §83.60(2) *Fla.Stat.* was clearly unconstitutional as a denial of due process.

When the State of Florida created a right to jury trial, which it guaranteed inviolate to its citizens, due process required that KARSTETER's demand for jury trial be honored and granted. To the extent that it deprived KARSTETER of such jury trial, §83.60(2) *Fla.Stat.* was clearly unconstitutional as a denial of due process of law, and

the opinion of Florida's Third District Court of Appeal, holding to the contrary, should be reversed and quashed.

C. Issue of Mootness.

When KARSTETER brought his appeal in the Circuit Court Appellate Division, and filed his brief, GRAHAM argued that the appeal should be dismissed because the issue had become moot through the passage of time and events. It was argued by GRAHAM that the eviction had been concluded, that KARSTETER was out of the demised premises and that "no practical result could be obtained by reviewing the questions presented". KARSTETER, however, pointed out that there is one very significant exception to the mootness doctrine, which the present proceeding fell well within.

In *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), the court reviewed a declaratory judgment action seeking a determination that sections of an Illinois election statute were unconstitutional. By motion to dismiss, it was urged that by the time that the matter came to be heard, the particular election which was involved had already been held and that, therefore, there was no possibility of granting any relief. The court, however, relying upon its earlier decision in *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, 316 (1911), recognized that the challenged statute would control future elections, and that the problem was, therefore, "capable of repetition, yet evading review." There was a need for resolution of the problem, and as such, the matter was not dismissed as moot.

The same result was obtained in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), wherein the court in considering a constitutional challenge to a state durational residence law for voters in Tennessee, specifically stated that:

> At the time the opinion below was filed, the next election was to be held in November, 1970, at which time Blumstein would have met the three-month part of Tennessee's durational residency requirements. The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellee can now vote, the problem to voters posed by the Tennessee residence requirements is " 'capable of repetition, yet evading review.' " *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). 405 U.S. at 333, n. 2, 92 S.Ct. at 998, 31 L.Ed.2d at 279.

See also: *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981).

The abrogation of the mootness doctrine in situations where a problem exists that is "capable of repetition, yet evading review" has also been recognized in cases involving other issues. In *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161 (1973), wherein Texas' anti-abortion statutes were held unconstitutional, this Court recognized that: "Pregnancy provides a classic justification for conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review.' "

Citing the elections and pregnancy cases as authority, the Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126, 94 S.Ct. 1694, 1700, 40 L.Ed.2d 1, 10 (1974), indicated that, in determining whether a case is one which invokes an issue "capable of repetition, yet evading review," the important ingredient is the existence of "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society". The case involved laws

affecting economic strikes by employees against an employer, and with respect to such strikes, the Court stated that:

> . . . the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. U.S. Dept. of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages 1971, Table A-3, p 16 (1973). A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue to force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present. 416 U.S. at 126, 94 S.Ct. at 1700, 40 L.Ed.2d at 10-11.

The same exception to the mootness doctrine was applied in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), which reviewed an order that restrained the news media from publishing or broadcasting accounts of confessions or admissions made by a defendant in a criminal proceeding. At the time of review the restraining order had expired. It was recognized, however, that such restraining orders relating to the news media are generally short lived, and if the court were to decline to address the issue, the dispute would evade review. The court therefore held that the matter was not moot.

In addition to arguing that the issues raised by KARSTETER were moot, GRAHAM also argued that KARSTETER had waived his appellate rights, since he chose to comply with the Final Judgmet of the trial court. Such a suggestion was ludicrous under Florida law.

In *Barry v. Robson*, 65 So.2d 739 (Fla. 1953), it was recognized that a judgment is the means by which a court renders its decision. In eviction proceedings, Florida law

provides that when a judgment has been entered in favor of the landlord, an expedited procedure is followed to place such landlord in possession of the premises. This procedure is set forth in §83.62 *Fla.Stat.*, which provides that:

> **83.62 Remedies; restoration of possession to landlord.**—In an action for possession, after entry of judgment in favor of the landlord, the clerk shall issue a writ to the sheriff describing the premises and commanding him to put the landlord in possession after 24 hours' notice conspicuously posted on the premises.

Faced with this statutory provision, KARSTETER's vacating the premises could hardly be said to be voluntary, when the alternative was to wait for the Sheriff to show up on his front doorstep and physically remove him, his wife and possessions from the premises, and leave them all stranded in the street.

In *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953), and in *Routal Corp., N.V., Inc. v. Ottati*, 391 So.2d 308 (Fla. 4th DCA 1980), it was recognized that there are two forms of surrender of possession of rental or leased property. In *Routal Corp., N.V., Inc. v. Ottai, supra*, the court described these forms of surrender as follows:

> The first, express surrender, requires an express agreement between the parties and we clearly do not have that here. The second, surrender by operation of law, may be implied from certain circumstances and will depend upon the facts of such case. Ottati received a notice requiring him to vacate by a certain date or face the legal consequences. A jury could reasonably infer that his compliance was therefore coerced and not voluntary. 391 So.2d at 309.

Considering the circumstances under which KARSTETER vacated the premises in question, it is clear that he was not leaving voluntarily, or of his own volition. This is particularly evident in that he has continuously

objected to his being forced out of possession, even through the present proceeding.

It should be recognized that Florida's Third District Court of Appeal, which upheld the constitutionality of §83.60(2) *Fla.Stat.*, apparently declined to accept GRAHAM's mootness argument, since it specifically considered KARSTETER's argument as presented in his petition and at oral argument. Additionally, since the present cause of action was instituted, the State of Florida has tightened the provisions of §83.60(2) *Fla.Stat.* [See p. 1 of this Petition, **supra**]. It is thus patently obvious that, in eviction proceedings, the State of Florida, through §83.60(2) *Fla.Stat.*, intends to continue to deprive tenants of their right to due process of law, to defend and be heard. As a consequence the matters raised at every stage of the Florida Court System, and as raised herein, are timely, pertinent, compelling and of great public importance. Such issues are clearly not moot.

CONCLUSION

Petitioner, KARSTETER, believes that, from the authorities cited in this Petition for Writ of Certiorari, §83.60(2) *Fla.Stat.* is clearly unconstitutional in that it deprives tenants in general, and deprived KARSTETER in particular, of the fundamental right of due process of law. As a consequence, it is respectfully requested that this Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari herein. It is further respectfully requested that if this Petition for Writ of Certiorari be granted, that the court reverse the opinion of Florida's Third District Court of Appeal, which specifically held §83.60(2) *Fla.Stat.* to be constitutional, and order this cause to be remanded for entry of appropriate orders relating to the unconstitutionality of such statute by the Florida courts. Additionally it is prayed that all awards of attorneys fees that have been entered against KARSTETER be reversed, and that an appropriate award of attorneys fees and costs be entered in his favor, as a consequence of his being forced to proceed through the various courts of Florida and the filing of the present petition, in accordance with §§83.48 and 59.46 *Fla.Stat.* (App. R-1).

Respectfully submitted,

STEVEN A. EDELSTEIN, ESQ.
RESS, GOMEZ, ROSENBERG,
HOWLAND & MINTZ, P.A.
1700 Sans Souci Boulevard
North Miami, Florida 33181
(305) 893-5506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the Petition for Writ of Certiorari were mailed to Elizabeth W. Joyce, Esq., Wisehart & Joyce, P.A., Attorneys for Respondent, 2840 S.W. Third Avenue, Miami, Florida 33129, and to Jerry Curington, Esq., Assistant Attorney General, Department of Legal Affairs, The Capital, Tallahassee, Florida 32301, this 16th day of September, 1988.

STEVEN A. EDELSTEIN, ESQ.